No. 327027

WASHINGTON STATE COURT OF APPEALS
DIVISION III

CRAIG S. CULBERTSON, a married man,

Appellant,

vs.

WELLS FARGO INSURANCE SERVICES USA, INC., North Carolina corporation; JOSHUA TYNDELL and JANE DOE, and the marital community comprised thereof; RHONDA IDE and JOHN DOE; and the marital community comprised thereof,

Respondents.

BRIEF OF RESPONDENTS

SCOTT A GINGRAS
WSBA No. 43886
WINSTON & CASHATT, LAWYERS, a
Professional Service Corporation
601 W. Riverside, Ste. 1900
Spokane, Washington 99201
Telephone: (509) 838-6131

Attorneys for Respondents

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	STATEMENT OF THE CASE	2
	A. Statement of Material Undisputed Facts.	2
	1. Start of Culbertson's at-will employment with Wells Fargo.	2
	2. Wells Fargo's Team Member Handbooks in effect at the beginning and end of Culbertson's at-will employment with Wells Fargo.	3
	3. Wells Fargo's compensation plans governing Culbertson's at-will employment remuneration, and the 2010 TSA non-compete agreement.	8
	4. Culbertson's termination of at-will employment from Wells Fargo, and his post-termination compensation paid by Wells Fargo in accordance with the 2013 Sales Incentive Plan.	16
	B. Statement of Material Procedural History.	17
	1. The matter on Appeal of Culbertson v. Wells Fargo, et al., Spokane County Superior Court Case No. 14-2-01009-0, before Superior Court Judge Michael P. Price.	17
	2. The matter not on Appeal of Wells Fargo v. Culbertson, Spokane County Superior Court Case No. 14-2-01021-9, before Superior Court Judge Annette S. Plese.	22

III. ARGUMENT 27

A. Judge Price's summary judgment dismissal of Culbertson's wrongful discharge claim should be affirmed because the Wells Fargo Team Member Handbook does not amount to promises of specific treatment in specific circumstances. 27

1. Wells Fargo's Team Member Handbook provides multiple clear and conspicuous disclaimer statements of Culbertson's at-will employment, and the lack of the creation of an employment contract. 29

2. Wells Fargo's Team Member Handbook contains only general statements of company policy that does not amount to promises of specific treatment in specific circumstances. 36

3. Wells Fargo's Team Member Handbook expressly reserves to Wells Fargo complete discretion for it to terminate Culbertson's at-will employment. 39

B. The Sales Incentive Plan in effect on Culbertson's termination precluded post-termination commissions as a matter of law, and no basis exists to reverse the trial court's refusal to apply "judicial estoppel". 41

1. The trial court properly exercised its discretion to refuse to apply judicial estoppel. 42

2. The applicable compensation plan precludes Culbertson's claim to post-termination commissions under the procuring cause doctrine. 49

C. Culbertson cannot demonstrate a manifest abuse of discretion in the trial court's denial of his Motion to Continue Hearing under CR 56(f) because the new evidence sought by Culbertson would not raise a genuine issue of fact relevant to Wells Fargo's Motion for Partial Summary Judgment. 51

D. Culbertson should not be entitled to an award of attorney's fees or costs on Appeal. 54

IV. CONCLUSION 55

TABLE OF AUTHORITIES

	Page
Cases	
Briggs v. Nova Servs., 166 Wn.2d 794, 213 P.3d 910 (2009)	27
Briggs v. Nova Services, 135 Wn.App. 955, 147 P.3d 616 (2006)	53
Buhr v. Stewart Title of Spokane, LLC, 176 Wn. App. 28, 308 P.3d 712 (2013)	51
Bulman v. Safeway, Inc., 144 Wn.2d 335, 27 P.3d 1172 (2001)	29
Butler v. Joy, 116 Wn.App. 291, 65 P.3d 671 (2003)	52
Clark v. Sears Roebuck & Co., 110 Wn.App. 825, 41 P.3d 1230 (2002)	40, 41
Drobny v. Boeing Co., 80 Wn.App. 97, 907 P.2d 299 (1995)	39
Duncan v. Alaska USA Federal Credit Union, Inc., 148 Wn.App. 52, 199 P.3d 991 (2008)	43, 50, 53
Flower v. T.R.A. Industries, Inc., 127 Wn.App. 13, 111 P.3d 1172 (2005)	44, 45
Garrett v. Morgan, 127 Wn.App. 375, 112 P.3d 531 (2005) overruled on other grounds, 160 Wn.2d 535 (2007)	48
Govier v. North Sound Bank, 91 Wn.App. 493, 957 P.2d 811 (1998)	43

King v. Clodfelter,
10 Wn.App. 514, 518 P.2d 206 (1974) 48

Labriola v. Pollard Group, Inc.,
152 Wn.2d 828, 100 P.3d 791 (2004) 43, 44, 46

Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.,
176 Wn.App. 168, 313 P.3d 408 (2013), rev.den.,
179 Wn. 2d 1019 (2014) 51

Markley v. Markley,
31 Wn.2d 605, 198 P.2d 486 (1948) 48

McClintick v. Timber Products Manufacturers, Inc.,
105 Wn.App. 914, 21 P.3d 328 (2001) 27, 37

Miller v. Campbell,
164 Wn.2d 529, 192 P.3d 352 (2008) 48

Nelson v. Southland Corp.,
78 Wn.App. 25, 894 P.2d 1385 (1995) 32

Quedado v. Boeing Co.,
168 Wn.App. 363, 276 P.3d 365 (2012) passim

Seattle-First Nat. Bank v. Marshall,
31 Wn.App. 339, 641 P.2d 1194 (1982) 48

Swanson v. Liquid Air Corp.,
118 Wn.2d 512, 826 P.2d 664 (1992) 30, 32-34

Taylor v. Bell,
___ Wn.App. ____, 340 P.3d 951 (2014) 42

Thompson v. St. Regis Paper Co.,
102 Wn.2d 219, 685 P.2d 1081 (1984) passim

Thong Choom v. Graco Children's Products, Inc.,
117 Wn.App. 299, 71 P.3d 214 (2003) 53

Willis v. Champlain Cable Corp.,
109 Wn.2d 747, 748 P.2d 621 (1998) 49

Wilson v. Steinbach,
98 Wn.2d 434, 656 P.2d 1030 (1982) 27

Woody v. Stapp,
146 Wn.App. 16, 189 P.3d 807 (2008) 27

Statutes and Rules

CR 56(c) 27

CR 56(f) passim

RAP 18.1 54

RCW 49.48.030 54

Washington Trade Secrets Act 23

Other Authorities

25 Wash. Prac., Contract Law And Practice § 17:5 (2d ed.) 30, 32

I. INTRODUCTION

Appellant Craig S. Culbertson ("Culbertson") sued Respondent Wells Fargo Insurance Services USA, Inc. ("Wells Fargo") for wrongful termination, and Wells Fargo and Respondent Joshua Tyndell ("Tyndell") for unpaid commissions, despite the fact that he was an at-will employee, and his compensation plan expressly established how post-termination commissions would be paid, which he received.

The trial court properly granted summary judgment dismissal of Culbertson's claims, finding as a matter of law that: (1) Culbertson's at-will employment was not altered by any specific promises of specific treatment; (2) Culbertson had been given reasonable notice of the compensation plan in effect at the time of his termination which indeed expressly precluded the post-termination commissions he claimed he was owed; and (3) Wells Fargo was not judicially estopped from enforcing the applicable compensation plan simply because it had argued in separate litigation that a trade secret non-compete agreement signed by Culbertson had sufficient independent consideration to be enforced under different Washington law.

Culbertson's appeal creates no issues of fact or applies different law to reverse the summary judgment ruling. Moreover, the trial court did not abuse its discretion in refusing to grant Culbertson a continuance of

the summary judgment hearing (as to his wage claims) when he failed to establish that the evidence he sought at the last minute would have created any genuine issue of material fact, even if he had obtained it. Culbertson's Appeal, and request for attorney's fees, should be denied and the trial court Orders affirmed.

II. STATEMENT OF THE CASE

A. Statement of Material Undisputed Facts.

1. Start of Culbertson's at-will employment with Wells Fargo.

On October 17, 2006, Acordia Northwest, Inc., then a Wells Fargo company (now Wells Fargo), made an offer of employment by written letter to Culbertson. (CP 9, 561-562) The offer of employment to Culbertson was for the position of a Wells Fargo Producer-Employee Benefits, full-time, fully commissioned employee. (CP 9, 561-562)

The Wells Fargo offer letter to Culbertson confirmed the details of the offer of employment with respect to "Job Responsibilities," "Compensation and Perquisites," "Employee Benefits," and "Additional Considerations." (CP 561-562) The letter also stated that Culbertson's employment offer was contingent upon execution of a Trade Secrets and Non-Solicitation Agreement (a non-compete agreement, hereinafter referred to as the "2006 TSA"). (CP 562) The offer letter further

specified that if Culbertson accepted the employment with Wells Fargo, his employment would be at all times "at-will," meaning that it had "no specified term or length" and that both parties had "the right to terminate [Culbertson's] employment at any time, with or without advance notice and with or without cause." (CP 562) The offer letter also indicated that no employee of Wells Fargo had the authority to alter Culbertson's at-will employment status. (CP 562) Lastly, the offer letter stated that "more information [was] available in the Wells Fargo Team Member Handbook, which could be located at www.wellsfargo.com/teamworks." (CP 562)

On November 1, 2006, Culbertson filled-out and signed a Wells Fargo Employment Application. (CP 555-559) In the application, it again expressly stated that Culbertson's employment with Wells Fargo would be at all times "at-will." (CP 558) Thereafter, on November 1, 2006, Culbertson signed the employment offer letter and the 2006 TSA, and then began his at-will employment with Wells Fargo. (CP 9, 559, 562, 578)

2. Wells Fargo's Team Member Handbooks in effect at the beginning and end of Culbertson's at-will employment with Wells Fargo.

Also upon the start of his employment, Culbertson signed a "Wells Fargo Team Member Acknowledgment." (CP 564) In that document, Culbertson acknowledged three things: (1) that he had received, or understood that he would be provided the Handbook for Wells Fargo

Team Members, in hard copy and/or be shown how to find it online, and understand its application to his employment with Wells Fargo; (2) that he read and would adhere to the Code of Ethics and Business Conduct and the Information Security Policy, which was included in the Handbook for Wells Fargo Team Members; and (3) that he agreed to the Electronic Human Resources System Authorization. (CP 564)

Culbertson acknowledges that he did in fact read a hard copy and an electronic online copy of the Wells Fargo Team Member Handbook effective on the date of his employment, which was the Handbook dated January 1, 2006 (hereinafter the "2006 Handbook"). (CP 9, 429) On the cover page of the 2006 Handbook, it states that the Handbook set forth the employment policies of Wells Fargo, and that the Handbook "is updated online on an ongoing basis." (CP 585) The cover page to the 2006 Handbook further indicated that "[t]his book supersedes all previous communications, written or oral, regarding these policies." (CP 585)

Additionally, on the first page of the 2006 Handbook, it provided an express disclaimer in the introductory paragraph that:

> [i]t's meant as an outline of policies and procedures covering Wells Fargo and its subsidiaries– **it is not a contract of employee "rights," nor does it attempt to offer an answer for every situation. Employment at Wells Fargo is on an "at-will" basis** (see the description on page 10).

(CP 591, emphasis added) On page 10 of the 2006 Handbook, in section 2.2, the Handbook defines Wells Fargo's "at-will" employment status:

> **[t]his Handbook is not a contract of employment**. Your employment with a Wells Fargo company has no specified term or length; **both you and Wells Fargo have the right to terminate your employment at any time, with or without advance notice and with or without cause**.
>
> **This is called "employment at will."** ... Any modification to your at-will employment status must be confirmed in writing by an officer of Wells Fargo at the level of executive vice president or higher, authorized by the Senior Human Resource Manager for your region or line of business.

(CP 600, emphasis added) Then, in Chapter 9 of the 2006 Handbook, entitled "Leaving Wells Fargo," it again expressly states that employment with Wells Fargo is "at-will," and that there was no contract of employment that changed the terms and conditions thereof:

> **This Handbook is not a contract of employment**. Your employment with a Wells Fargo company has no specified term or length; **both you and Wells Fargo have the right to terminate your employment at any time, with or without advance notice and with or without cause**.

(CP 686, emphasis added)

After Culbertson's start date of employment, Wells Fargo periodically revised and published to employees, including Culbertson, revised versions of the Handbook (as authorized by the 2006 Handbook). (CP 9, 585) As acknowledged by Culbertson's Complaint, the last version

of the Wells Fargo Team Member Handbook updated prior to Culbertson's termination of February 3, 2014, was dated January 2014 (hereinafter the "2014 Handbook")[1]. (CP 9, 429, 734-1004) As Culbertson acknowledges in his trial court and Appellate Briefing, the 2006 Handbook and the 2014 Handbook are very similar, and contain "nearly the exact same language" throughout. (Appellant's Opening Brief, p. 28)

First, in the 2014 Handbook, it contained essentially the same language regarding at-will employment status as the 2006 version, and nearly identical disclaimer language. For example, on the first page of the 2014 Handbook, it provides a clear disclaimer that the Handbook does not create a contract:

> **The handbook is not a contract of employment** nor can it offer an answer for every situation. **Employment at Wells Fargo is on an "at-will" basis.** ... This handbook supersedes all previous communications, written or oral, regarding these policies.

(CP 737, emphasis added) Second, on page 84 of the 2014 Handbook, Wells Fargo again defines "Employment at Will" for its employees, and provides another disclaimer:

---

[1] The correct Wells Fargo Team Member Handbook at issue on Culbertson's wrongful discharge claim is Handbook with the effective date of January, 2014. While Wells Fargo has cited to the 2006 Handbook to demonstrate Culbertson's knowledge regarding at-will employment and disclaimers of contractual rights at the start of Culbertson's employ with Wells Fargo, it is the 2014 Handbook at issue here.

Thus, Culbertson's reliance on various provisions of the 2006 Handbook to create specific promises in specific situations to support his claim for wrongful termination is misplaced; however the pertinent language is similar, as discussed above.

> **[t]his handbook is not a contract of employment**. Your employment with a Wells Fargo company has no specified term or length; **both you and Wells Fargo have the right to terminate your employment at any time, with or without advance notice and with or without cause**.
>
> **This is called "employment at will."** ... Any medication to your at-will employment status must be confirmed in writing by an officer of Wells Fargo at the level of executive vice president or higher and authorized by the senior Human Resource manager for your business group.

(CP 823, emphasis added) Third, on page 140 of the 2014 Handbook, Wells Fargo once more makes it clear that while it may choose to use performance counseling and/or corrective action, Wells Fargo still retains the ultimate right and discretion to terminate its employee's at-will employment, with or without notice, with or without cause, and with or without performance counseling and/or corrective action first:

> [i]n most cases, if you have a performance issue, your manager will work with you to provide the appropriate performance counseling and corrective action so that you have the opportunity to improve. Performance counseling may be provided through verbal discussion or in writing. For example, an optional written Performance Improvement Plan may be issued in conjunction with any level of counseling or corrective action. **However, the policy is not progressive.** This means that your manager reserves the right to use any part of the process that he or she feels is appropriate for the situation – and, if necessary, to terminate employment without implementing performance counseling and corrective action. This is consistent with our "employment at will" policy.

(CP 879, emphasis original)

Lastly, in the "Career, Performance & Problems Solving" chapter of the 2014 Handbook, Wells Fargo expressly refers its employees back to the "Employment at Will" policy of the Handbook (which is underlined/hyperlinked), and states that they do not "alter or modify Wells' Fargo's 'employment at will policy'." (CP 879, 882) The underlined/hyperlink reference back to the employment at will policy section of the 2014 Handbook is also found in the provision of the 2014 Handbook regarding "Immediate Termination." (CP 975)

3. Wells Fargo's compensation plans governing Culbertson's at-will employment remuneration, and the 2010 TSA non-compete agreement.

Culbertson's at-will employment offer letter of October 17, 2006 set forth his starting compensation and benefits: "$80,000.00 starting salary, paid bi weekly and trued up each quarter until validated based on: 35% New Business and 25% Renewal 'billed' commission," and "$30,000 Signing Bonus – to be paid within 60 days of start date." (CP 561)

In or around December, 2009, Wells Fargo rolled-out a new "Wells Fargo Insurance Services USA, Inc. Producer Plan" that unilaterally modified the terms and conditions of compensation for select at-will Wells Fargo employee positions, which included Culbertson as a Sales Executive in the Employee Benefits category. (CP 9, 430, 534-535, 542-546, 1005-1012)

In or around the same time that Wells Fargo was introducing its new compensation plan, Wells Fargo also rolled-out a new non-compete agreement to supersede the 2006 TSA, entitled "Wells Fargo Agreement Regarding Trade Secrets, Confidential Information, Non-Solicitation, and Assignment of Inventions" (hereinafter referred to as the "2010 TSA"). (CP 534-535, 547-549, 566-568)

On or about December 22, 2009, Culbertson received a packet of documents from Ms. Vickie Kitley, the Commercial Lines Manager of the Wells Fargo Spokane Washington branch office, containing: (1) a copy of "Wells Fargo Insurance Services USA, Inc. Producer Plan, effective January 1, 2010", which is five pages in length; (2) Culbertson's "Appendix A[2]" to the January 1, 2010 Producer Plan, specifically titled " WFIS Producer Plan – Appendix A Participant Draw and Commission Rates," which is one page in length; and (3) a copy of the new 2010 TSA[3], which is three pages in length. (CP 534-535, 542-549, 565-568)

---

[2] In Appellant's Opening Brief Culbertson mischaracterizes the one-page "Appendix A" as the entire "2010 Producer Plan"; however, the entire January 1, 2010 Producer Plan and Appendix A thereto is six pages total, and contains multiple more terms and language than as represented by Culbertson in his Appellant's Opening Brief. (CP 542-546, 565, 1005-1011)

[3] The extent of the Producer Plan and TSA documents Culbertson received in December of 2009, when, by whom he received them, and the words used in distributing the documents are disputed by Culbertson; however, they were not material or relevant for the determination of Wells Fargo's Motion for Partial Summary Judgment.

It is undisputed that the January 1, 2010 Producer Plan expressly stated therein that it superseded any previous agreement and/or arrangement regarding compensation for Wells Fargo Sales Executives. (CP 542, 1005) The January 1, 2010 Producer Plan also set forth how commissions where going to be calculated and paid, including how they would be calculated and paid to plan participants if their employment was terminated. (CP 543-544, 1006-1007)

Lastly, it is undisputed that Culbertson's Appendix A to the Producer Plan, which was signed by him on December 22, 2009, provided his individual participant draw and commission rates, and also stated expressly therein Culbertson acknowledged that he had reviewed both the Plan and the Appendix A and that he would be paid in accordance with the terms of the Sales Producer Plan even if he did not sign Appendix A:

> The Participant's signature above **acknowledges that the Plan and Appendix A have been reviewed** by the Participant. **The provisions of the WFIS Producer Plan will be applied and the Participant will be paid in accordance with the terms even if the Participant does not sign Appendix A.**

(CP 9, 565, emphasis added)

Appendix A also provided Culbertson with notice that Wells Fargo was offering a new and additional commission rate (consideration), for one year only, for those current Wells Fargo employees who agreed to

sign and enter into the new 2010 TSA. Specifically, it put Culbertson on notice that Wells Fargo would pay Culbertson additional one percent's (1%) on his new revenue and net new revenue for the 2010 Plan year, but only if he signed and entered into the new 2010 TSA:

> **TSA Consideration:**
>
> For the 2010 Plan year only (January 1, 2010 through December 31, 2010), Participant will receive the following consideration for signing the new TSA for Wells Fargo Insurance Services USA:
>
> Additional 1% on New Revenue and
> Additional 1% on Net New revenue.
>
> Net New Revenue is defined as new revenue recorded in 2010 less lost business...This is a one-time payment that will be made after the end of the plan year.
> All terms and conditions of the Plan apply to the calculation and payout of this consideration

(CP 565)

On January 5, 2010, Culbertson signed and entered into the 2010 TSA. (CP 508, 568) Following the conclusion of the 2010 calendar year, Culbertson's Additional 1% on New Revenue and Additional 1% on Net New revenue was calculated by Wells Fargo to be $1,088.79. (CP 116-117, 293) Wells Fargo then paid Culbertson the consideration of the additional 1% commissions owed to him as a result of signing and entering into the 2010 TSA. (CP 116-117, 293) That amount was included in Culbertson's paycheck of March 18, 2011. (CP 116-117, 293)

Following the roll-out of the 2010 Producer Plan, Wells Fargo thereafter reviewed its compensation plan to ensure the plan policies and pay practices aligned. Wells Fargo then rolled-out updated and amended the Producer Plans (also known as the WFIS Sales Incentive Plan in later versions) for its sales executives, including Culbertson, on approximately a yearly basis thereafter - one on October 1, 2011[4], and one on April 1, 2013. (CP 430, 1013-1028) The last version of the Sales Incentive Plan rolled-out and effective at the time of Culbertson's termination of employment was dated effective April 1, 2013. (CP 431, 1021-1028)

Wells Fargo employees, including Culbertson, received actual notice of the upcoming changes for the 2013 Sales Incentive compensation Plan. Initially, employees received actual notice via e-mail by Mr. Kevin Kenny, Executive Vice President and Head of Insurance Brokerage and Consulting for Wells Fargo. Mr. Kenny sent a work e-mail to all Wells Fargo sales executives, including Culbertson, on December 31, 2012, prior to its effective date of April 1, 2013. (CP 431-432, 1029-1031) In his

[4] As Culbertson notes in his Opening Brief, Culbertson signed the acknowledgment on Appendix A to the October 1, 2011 Plan. (CP 569-570) Nonetheless, his signature on the 2011 Appendix A to the Plan is irrelevant for two reasons. First, just as with the 2010 Appendix A to the Producer Plan, the 2011 Appendix A version also contained the express language that the employees signature was only an acknowledgement that the employee had reviewed both the Plan and the Appendix, and that the terms of the Sales Incentive Plan would be applied and the employee paid in accordance with the terms of the Plan even if the employee did not sign Appendix A. Secondly, it is irrelevant because the 2011 compensation Plan was not even the true and correct compensation Plan that governed the terms and conditions of Culbertson's Wells Fargo compensation at the time of his termination. As provided herein, that Plan was the 2013 Sales Incentive Plan.

Wells Fargo e-mail, Mr. Kenny noted this was part of the usual annual review process, and outlined significant changes to numerous terms regarding the methodology for paying commissions under the Plan. (CP 431-432, 1029-1031) Culbertson not only received written notice of the upcoming unilateral modification by and through Mr. Kenny's e-mail, he actually acknowledged and responded to it via Wells Fargo e-mail to Tyndell, his Spokane Branch supervisor. (CP 432, 1032, 1072-1074)

Then, prior to the April 1, 2013 roll-out, and in conjunction with a new computer system that was also being introduced to calculate compensation in accordance with the Sales Incentive Plan for sales executives such as Culbertson, Culbertson was also sent emails in January of 2013 referencing the "Sales Incentive Plan," and a particular section thereof, "Section IV.B." of the Plan. (CP 1037-1039) Specifically, Culbertson was forwarded an e-mail from Mr. Roger Roper, then a Finance Manager of Wells Fargo, dated January 23, 2013. (CP 1059-1061)

In Mr. Roper's e-mail he stated with regard to Culbertson's compensation that "[c]ommission payment on ALL open receivables as of true up date will be withheld from true up payments, no matter what the age of the receivable, in accordance with Section IV.D of the Sales Incentive Plan." (CP 1060) Culbertson then responded to that email with a question regarding receivables impact on his commission payments, but

did not express any surprise or lack of awareness of the Sales Incentive Plan, or that it apparently had multiple sections and terms not found in the one page Appendix A to the Plan, or that he disagreed with it. (CP 1059)

Finally, even after the roll-out and effective date of the April 1, 2013 Sales Incentive Plan, Tyndell, the Spokane branch manager, sent out an e-mail on October 29, 2013, to all Spokane sales executives, which included Culbertson, regarding the 2013 Sales Incentive Plan. (CP 431, 1029) In Tyndell's October 29 e-mail to all Spokane sales employees, with the "Subject" line of "2013 Sales Incentive Plan – Posted on InsuranceWorks," Tyndell copied Ms. Kenny's earlier December 31, 2012, e-mail, and stated:

> I believe I have sent this out previously, but if not they now have a link that you can use to get to the 2013 Sales Incentive Plan document. Please take time to review this document and let me know if you have any questions or wish to discuss this. For your convenience I have provided a link to the Plan Document.
>
> http://insuranceworks.wellsfargo.com/training/MgrToolkit/Pages/default.aspx
>
> Once you get to the main page look under "Our Team" and then "2013 Incentive Plan."
>
> Let me know if you have any questions.

(CP 1029) It is factually undisputed that Culbertson also received this written notice of the 2013 Sales Incentive Plan document by and through his Wells Fargo work e-mail. (CP 432, 1029-1031, 1033)

Of relevance to this matter, the April 1, 2013 Wells Fargo Insurance Brokerage Sales Incentive Plan and Appendix A thereto contains five key components. First, it makes it clear in section II that the 2013 "Plan supersedes any prior plan(s) or agreements (written or verbal) providing compensation to Participants and will take effect as of April 1, 2013, and will remain in effect until otherwise suspended, modified, or terminated." (CP 1021)

Second, it lists the participants of the Plan (i.e. Wells Fargo employment positions), which includes Culbertson as a (former) Sales Executive Benefits. (CP 1021)

Third, in section IX.D. of the 2013 Sales Incentive Plan, Wells Fargo again expressly disclaims that the Plan does not create an employment contract, guarantee employment, nor alter the at-will employment relationship of the participants. (CP 1025)

Fourth, in Appendix A to the April 1, 2013 Plan, it again contains the language that the provisions of the 2013 Sales Incentive Plan will be applied and the employee will be paid in accordance with its terms even if the employee does not sign it. (CP 1027)

And Fifth, and most important for this case, it lays-out the "Compensation Structure" for the participants, how the participant's "Commission Calculations" are done, and sets forth how/when the "Commission Payments" for the participants are made by Wells Fargo, including how participant's commissions are paid if their employment is terminated. (CP 1022-1023)

In pertinent part of section VI.A. of the April 1, 2013 Plan under the "Commission Payments," it expressly sets forth post termination commissions as follows:

> **A. Commission Payout for Terminated Participant**
> Plan Participants who are not on a Validation Draw who terminate employment, for any reason, other than those listed in the section IX, will be paid Credited Commissions earned through the Participant's termination date less any Draw paid. Credited Commissions are deemed earned once the Participant's Eligible Revenue has been collected by WFI.

(CP 1023)

4. Culbertson's termination of at-will employment from Wells Fargo, and his post-termination compensation paid by Wells Fargo in accordance with the 2013 Sales Incentive Plan.

On February 3, 2014, following an investigation by Wells Fargo into Culbertson, Culbertson's employment was terminated by Wells Fargo

for falsification of company records.[5] (CP 10, 28) After Culbertson's termination, and pursuant to and in accordance with section VI.A. of the April 1, 2013 Sales Incentive Plan, Culbertson's "Commission Payout for Terminated Participant" was calculated, verified and paid by Wells Fargo to Culbertson. (CP 432-433, 518-519, 526-527, 529-530, 550-551) Accordingly, Culbertson has been completely and fully paid any and all compensation he is entitled to from Wells Fargo. (CP 432-433, 518-519, 526-527, 530-531, 550-551)

B. Statement of Material Procedural History.

1. The matter on Appeal of Culbertson v. Wells Fargo, et al., Spokane County Superior Court Case No. 14-2-01009-0, before Superior Court Judge Michael P. Price.

On March 21, 2014, Culbertson filed a Complaint in Spokane Superior Court against Wells Fargo, Tyndell (and his marital community), and Ms. Rhonda Ide (and her martial community). (CP 7)

Culbertson's Complaint alleged sixteen causes of action: (1) Wrongful Discharge in Violation of Specific Promises in Handbook; (2)

[5] Regardless of Wells Fargo's stated reason for Culbertson's termination (and Culbertson's disagreement therewith), Culbertson judicially admitted that his employment with Wells Fargo was at all times "at-will;" therefore, it is irrelevant whether Culbertson's termination was with or without cause, and with or without advance notice. (CP 506) Moreover, because Wells Fargo moved for summary judgment of Culbertson's wrongful discharge claim solely on the first element of the prima facie case (i.e. whether, Wells Fargo created an atmosphere of job security and fair treatment with promises of specific treatment in specific situations in its Handbook), and has not raised the issues of the other prima facie elements of breach or justifiable reliance of the Handbook terms, any other facts of the actions/conduct surrounding Culbertson's termination and thereafter is also factually and legally irrelevant to this Court and will not be addressed by Wells Fargo.

Wrongful Withholding of Wages/Intentional Withholding of Wages/Attorneys' Fees; (3) Breach of Contract; (4) Breach of Covenant of Good Faith and Fair Dealing; (5) Promissory Estoppel and Detrimental Reliance; (6) Quantum Meruit/Unjust Enrichment; (7) Conversion; (8) Fraud/Intentional Misrepresentation; (9) Negligent Misrepresentation; (10) Violation of Washington Consumer Protection Act; (11) Tortious Interference with Business Expectancies; (12) Defamation; (13) Invasion of Privacy-False Light; (14) Invasion of Privacy-Appropriation of Name and Likeness; (15) Negligent Infliction of Emotional Distress; and (16) Outrage; Intentional Infliction of Emotional Distress. (CP 12-22)

On May 23, 2014, Wells Fargo (and Tyndell) filed a Motion for Partial Summary Judgment, seeking to dismiss Culbertson's first through tenth causes of action. (CP 469) Wells Fargo requested summary judgment dismissal of Culbertson's: (1) first cause of action for "wrongful discharge" because as a matter of law it was undisputed that the employment policy manual of Wells Fargo did not contain promises of specific treatment in specific situations regarding the termination of Mr. Culbertson's employment; and (2) second through tenth causes of action for unpaid wages/commissions because the undisputed facts established that the 2013 Wells Fargo Insurance Brokerage Sales Incentive Plan precluded post-termination commissions. (CP 472-474)

Also on May 23, 2014, Culbertson simultaneously filed his own Motion for Partial Summary Judgment, seeking an order in his favor of partial judgment of liability against Wells Fargo on his breach of contract claim for alleged failure by Wells Fargo to make post termination commission payments, contending that the final compensation agreement governing his employment with Wells Fargo was the single page Appendix A to the 2011 Sales Incentive Plan that he signed on November 22, 2011, which did not expressly state how he would be paid commissions after his employment was terminated. (CP 43, 74-75)

On June 9, 2014, Culbertson filed a Motion to Continue Hearing on Wells Fargo's Motion for Partial Summary Judgment with respect to Culbertson's claims two through ten (his wage claims). (CP 101) In that Motion Culbertson argued that he could not present to the trial court by affidavit facts essential to justify his opposition because he was in need of discovery. (CP 101-102) The only discovery identified by Culbertson was an expert inspection of the hard drive to his former Wells Fargo work computer to determine if the electronic link was open to the Wells Fargo 2013 Sales Incentive Plan in the October 29, 2013 e-mail sent to Culbertson by Tyndell, and if the link was open, when. (CP 102)

On July 16, 2014, following complete briefing and oral argument by both parties on the three Motions, Judge Price issued and filed his

written Order **Granting** Defendants' Motion for Partial Summary Judgment RE: Plaintiff's First through Tenth Causes of Action; **Denying** Plaintiff's Motion to Continue Hearing on Defendants' Motion for Partial Summary Judgment Pursuant to CR 56(f); and **Denying** Plaintiff's Motion for Partial Summary Judgment. (CP 218, emphasis original).

In his Order, Judge Price found: (1) Culbertson failed to establish how the computer forensic expert examination of his work computer and the e-mail link would raise and issue of material fact as to whether or not Culbertson received reasonable notice of the 2013 Sales Incentive Plan. Judge Price therefore concluded that he was denying Culbertson's Motion to Continue the Hearing; (2) as a matter of law Culbertson's employment at Wells Fargo was at all times "at-will," and that Culbertson's at-will employment relationship was not altered by the Wells Fargo Handbook because reasonable minds could not differ that the language in the Handbook did not sufficiently constitute an offer or a promise of specific treatment in specific circumstances, the Handbook contained conspicuous disclaimers that were effectively communicated to Culbertson, and the Handbook gave Wells Fargo the discretion to apply the alleged specific promises claimed by Culbertson; (3) by providing reasonable notice to Culbertson of the 2013 Sales Incentive Plan, as a matter of law Wells Fargo unilaterally modified the terms of Culbertson's employment

compensation; and (4) it was undisputed that the 2013 Sales Incentive Plan included the express terms of how Culbertson would be paid commissions upon termination of his employment, and that Culbertson was paid all compensation due based on those terms. Therefore, Judge Price granted Wells Fargo's Motion for Partial Summary Judgment of claims two through ten, and Denied Culbertson's Motion for Partial Summary Judgment on his breach of contract claim. (CP 222-224)

On July 28, 2014, Culbertson moved for reconsideration of Judge Price's Order on the Summary Judgment Motions and the Motion to Continue Hearing under CR 59, asserting that Wells Fargo's position and Judge Plese's decision in the companion case (discussed below), established that the document Culbertson signed on December 22, 2009 (Wells Fargo 2010 Producer Plan Agreement Appendix A) was the entirety of the compensation agreement between Wells Fargo and Culbertson, thereby becoming a "bilateral contract" on all of his employment terms that could not be altered by Wells Fargo without Culbertson's consent judicially estopping Wells Fargo from taking a contrary position. (CP 311, 318)

On August 8, 2014, because all of the citations to brief, procedural history, and various transcripts of oral argument did nothing more than reargue Culbertson's position that "Appendix A" was the entire

compensation agreement relating to his employment, which could not be modified without Culbertson's consent, Judge Price summarily denied Culbertson's Motion for Reconsideration. In his Order, Judge Price noted that he had "reviewed and studied the pleadings in the matter of Wells Fargo vs. Craig S. Culbertson, Spokane Superior Court No. 2014-02-01021-9." (CP 405-406)

On August 15, 2014, Culbertson filed his Notice of Appeal to Court of Appeals Division III, seeking review of Judge Price's Order on the parties' Motions for Partial Summary Judgment, his Motion to Continue Hearing, and his Motion for Reconsideration. (CP 407-408)

On August 21, 2014, the parties filed and Judge Price entered a Stipulated Order of Dismissal with Prejudice of Culbertson's Causes of Action Eleven through Sixteen.[6] (CP 423-425)

2. The matter not on Appeal of Wells Fargo v. Culbertson, Spokane County Superior Court Case No. 14-2-01021-9, before Superior Court Judge Annette S. Plese.

Contemporaneous to the filing of the Complaint by Culbertson in this case, on March 21, 2014, Wells Fargo filed a separate lawsuit against Culbertson in Spokane County Superior Court for Culbertson's breach of 2010 TSA, to enforce the 2010 TSA, and for alleged violations of the

[6] Ms. Ide and John Doe (and the marital community) were only named defendants in claims 11-16 of Culbertson's Complaint. (CP 12-22) Because those claims have been dismissed with prejudice, Ms. Ide and John Doe are technically no longer parties to this Action or Respondents in this Appeal. (CP 423-425)

Washington Trade Secrets Act. (CP 109-131) In that case, Culbertson alleged as one of his defenses that the 2010 TSA was not valid and enforceable against him for lack of independent consideration. (CP 513)

On May 9, 2014, Wells Fargo filed a Motion for Partial Summary Judgment seeking an Order from Judge Plese that the 2010 TSA was enforceable against Culbertson, and for Culbertson's breach thereof. (CP 232) Also on May 9, 2014, Culbertson filed his own Motion for Partial Summary Judgment, arguing that the 2010 TSA lacked consideration, or in the alternative, that Wells Fargo was equitably estopped from enforcing it against him. (CP 244) Thereby, the sole issue before Judge Plese (relevant here) was whether the 2010 TSA signed by Culbertson on January 5, 2010, was supported by independent consideration.

In the case before Judge Plese, Wells Fargo never contended that the 2010 Producer Plan was limited to the one page Appendix A signed by Culbertson on December 22, 2009, nor that his signature on Appendix A to the 2010 Producer Plan was relevant to the ultimate determination of the validity of the 2010 TSA. Moreover, despite Culbertson's allegations to the contrary, Wells Fargo has never contended that the 2010 Producer Plan was an "exchange of promises" or a "bilateral contract," not subject to unilateral revision. Instead, again the sole (relevant) issue before Judge Plese on the parties cross-Motions for Partial Summary Judgment was

whether Culbertson, by signing the 2010 TSA (not Appendix A) on January 5, 2010, and thereafter accepting the increased commission consideration, created a valid and enforceable non-compete agreement. Judge Plese found that it did. (CP 295, 299-303)

Wells Fargo consistently maintained that the increased commissions were consideration for entering into the 2010 TSA, and not for simply signing the Appendix A to the 2010 Producer Plan:

> increased 1% in commissions was not an existing obligation of Wells Fargo, nor an existing benefit for Culbertson prior to his agreement to enter into the 2010 TSA. The bargained for exchange of promises was an increase in commission for entering into the new agreement. It is further undisputed that employees of Wells Fargo who did not sign the 2010 TSA did not receive the increased commission. (Aff. of N. Taylor-Babcock, ¶8) It is further undisputed that Culbertson indeed was actually paid the increased commissions after he signed and entered into the 2010 TSA.

(CP 239-240) Obviously all references to the "new agreement" in that matter were concerning the 2010 TSA, and not the 2010 Producer Plan. Then, in its opposition memorandum, Wells Fargo argued plainly that:

> Culbertson accepted the additional 1% commissions when he signed the 2010 TSA, and thereafter received the additional 1% commissions. These facts establish the appropriate additional consideration independent of Wells Fargo's previous agreements with Culbertson, and satisfy Washington law rendering the 2010 TSA enforceable.

(CP 251) Then, in its reply brief, Wells Fargo argued and put forth direct evidence before Judge Plese that:

> employees who did not sign the new 2010 TSA did not receive the increased independent consideration. It is undisputed that Culbertson signed it and got the additional commissions. ... Culbertson makes the unsupported allegation that the terms of Appendix A entitled him to the increased commissions, irrespective of whether he signed. Not only is that not contained in the express terms of the contract, it is simply untrue. The undisputed testimony is that the sales executive who did not sign, did not receive the consideration.

(CP 264-265) Finally, in oral argument before Judge Plese, counsel for Wells Fargo argued specifically in reference to the 2010 TSA, and not Appendix A to the 2010 Producer Plan, that:

> We're giving you notice if you choose to sign a new trade secret agreement and new restrictive covenant, we're offering you additional consideration, additional one percent on new revenue and additional one percent on new net revenue.

(RP 5-6, CP 277-278)

> Clearly he hasn't read the plain language of what the document says. Again, Appendix A is to the comp plan, and it says in there it's giving him notice that purchaser will receive the following consideration for signing the new TSA. One percent on new revenue and additional one percent on net new revenue. He's not getting that for signing the comp plan or Appendix A.

(RP 11, CP 283)

> The appendix is merely saying we're offering, we're telling you if you want to sign this, we are going to give you

> additional consideration, more money. Culbertson had that choice. He signed it. He got it.
> At this point, he has buyer's remorse. He wishes he didn't sign it, but undisputed facts are that he did, and now he wants to unwind that.

(RP 12, CP 284).

Culbertson attempts to argue in his Appellant's Opening Brief that Wells Fargo claimed in its case before Judge Plese that Culbertson accepted the consideration offered by Wells Fargo when he signed the Appendix A to the 2010 Producer Plan; however, when reading Wells Fargo's counsel's oral argument statements in full context, all of Wells Fargo's arguments and references to signing "it", was obviously in reference to signing the 2010 TSA, and not to when Culbertson signed the Appendix A to the 2010 Producer Plan.

Ultimately, on June 6, 2014, Judge Plese ruled that as a matter of law, the 2010 TSA Culbertson signed on January 5, 2010 was a valid and legal document as it was supported by the independent consideration paid to Culbertson of the additional 1% commissions. Judge Plese ruled however that there were issues of fact as to Culbertson's defense of equitable estoppel. As a result, on July 1, 2014, Judge Plese entered an Order Granting in Part and Denying in Part Wells Fargo's Motion for Partial Summary Judgment, and Denied Culbertson's Motion for Partial Summary Judgment. (CP 295, 299-303)

III. ARGUMENT

When reviewing an order of summary judgment, the Court of Appeals engages in the same inquiry as the trial court. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). As a result, summary judgment is appropriate if the pleadings, affidavits, depositions and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). The Court of Appeals may affirm the trial court's grant of summary judgment if it is supported by any grounds in the record. Woody v. Stapp, 146 Wn.App. 16, 21, 189 P.3d 807, 809-10 (2008).

A. Judge Price's summary judgment dismissal of Culbertson's wrongful discharge claim should be affirmed because the Wells Fargo Team Member Handbook does not amount to promises of specific treatment in specific circumstances.

Washington has long adhered to the "terminable-at-will" doctrine as governing the relationship between an employer and employee. McClintick v. Timber Products Manufacturers, Inc., 105 Wn.App. 914, 920, 21 P.3d 328, 331 (2001). A "terminable-at-will" employment relationship constitutes employment of indefinite duration which may be terminated by either the employer or the employee at any time, "with or without cause." See e.g., Briggs v. Nova Servs., 166 Wn.2d 794, 801, 213 P.3d 910, 914 (2009). It is undisputed that Culbertson's employment

with Wells Fargo was at all times "at-will," and Wells Fargo had the legal right to terminate Culbertson's employment at any time, with or without cause, with or without advance notice.

Nonetheless, under Washington state law, at-will employment can be altered in the limited circumstance when an employer creates an atmosphere of job security and fair treatment by promises of specific treatment in specific situations in their employment handbook, and the employee relies thereon. The "promises of specific treatment in specific situations" claim is based on an equitable theory of justifiable reliance. Quedado v. Boeing Co., 168 Wn.App. 363, 368, 276 P.3d 365 (2012), citing Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 230, 685 P.2d 1081 (1984).

Thus, to establish a basis to assert a claim for wrongful discharge under this equitable theory, Culbertson had to establish that: (1) Wells Fargo created an atmosphere of job security and fair treatment with promises of specific treatment in specific situations through statements in its employment Handbook; (2) Culbertson justifiably relied on those promises, and (3) Wells Fargo breached the promises. Quedado, 168 Wn.App. at 368-369, 276 P.3d 365; see also, Thompson, 102 Wn.2d at 230, 685 P.2d 1081. If reasonable minds cannot differ in resolving these questions, it is proper for a trial court to decide them as a matter of law on

summary judgment. Bulman v. Safeway, Inc., 144 Wn.2d 335, 351, 27 P.3d 1172 (2001). That is, "[i]n interpreting the language of employment policies, 'if reasonable minds cannot differ as to whether language sufficiently constitutes an offer or a promise of specific treatment in specific circumstances, as a matter of law the claimed promise cannot be part of the employment relationship.'" Bulman, 144 Wn.2d at 351, 27 P.3d at 1180. Here, the first element to Culbertson's wrongful discharge claim is dispositive.[7] Reasonable minds cannot differ in finding that the Wells Fargo employment policy manual does not contain a promise of specific treatment in specific situations under the undisputed facts of this case.

Washington courts have found that there are three separate and distinct disjunctive circumstances whereby employers will not be bound by statements in employment handbooks: (1) disclaimers; (2) general company policies; or (3) employer discretion. All three are applicable in this case, and are addressed separately as follows.

1. Wells Fargo's Team Member Handbook provides multiple clear and conspicuous disclaimer statements of Culbertson's at-will employment, and the lack of the creation of an employment contract.

[7] Culbertson argues extensively, both factually and legally, for reversal of the grant of summary judgment based on the second and third elements of the prima facie case of his wrongful discharge claim - justifiable reliance and breach of the Handbook terms. However, Wells Fargo did not move, and Judge Price did not grant summary judgment, on either of those two prima facie elements. Therefore, Wells Fargo will not address those irrelevant factual and legal arguments.

Employers in Washington can disclaim that nothing contained in their handbook is intended to be part of the employment relationship and are simply general statements of company policy. Thompson, 102 Wn.2d at 230, 685 P.2d 1081; 25 Wash. Prac., Contract Law And Practice § 17:5 (2d ed.). It is generally recognized that so long as a disclaimer is conspicuous, effectively communicated to the employee, and it is not negated by later inconsistent representations by the employer, an employer in Washington can disclaim what might otherwise appear to be enforceable promises in handbooks or manual or similar documents. Quedado, 168 Wn.App. at 374, 276 P.3d 365, citing Swanson v. Liquid Air Corp., 118 Wn.2d 512, 519, 826 P.2d 664 (1992).

Whether disclaimers are effective in an employment handbook (to defeat a claim of specific promises) can be a matter of law to be determined on summary judgment if they are: (1) "communicated" to the employee(s); and (2) the communication must be "effective." Quedado, 168 Wn.App. at 374, citing Swanson, 118 Wn.2d at 519.

Here, the Wells Fargo Team Member Handbook contains multiple express conspicuous disclaimers that the Handbook does not create a contract or grant employee rights, but instead is simply an outline of general policies for at-will employment. The first is contained in the second paragraph on the very first page of the "Wells Fargo Team

Member Handbook." It states plainly that the "handbook is not a contract of employment nor can it offer an answer for every situation. Employment at Wells Fargo is on an 'at-will' basis." (CP 737) The second is found on page 84, which defines the "Employment at Will" relationship policy of Wells Fargo. In that policy section of the Handbook it states: "handbook is not a contract of employment. Your employment with a Wells Fargo company has no specified term or length; both you and Wells Fargo have the right to terminate your employment at any time, with or without advance notice and with or without cause." (CP 823)

Moreover, in the sections that Culbertson claims create specific promises in the "Career, Performance & Problems Solving" chapter of the Handbook, Wells Fargo expressly refers its employees back to the "Employment at Will" policy of the Handbook, and states that they do not "alter or modify Wells' Fargo's 'employment at will policy'." (CP 879-882) The direct reference back to the employment at-will policy section is also found in the provision of the Handbook regarding "Immediate Termination" that Culbertson cites to support his claim. (CP 975)

In this case, there is no dispute as to the material fact that the disclaimers were "communicated" to Culbertson because they were contained in documents that he signed, as well as contained in the very Handbook that he now attempts to use to supports his wrongful discharge

claim. Therefore, the only issue raised by Culbertson on the disclaimers in his Appellant's brief is whether the disclaimers were "effectively" communicated to Culbertson. That is, whether they were conspicuous.

Contrary to Culbertson's claim that the disclaimers were not conspicuous, there is no requirement of Washington law that a disclaimer be bolded, underlined, and/or italicized for it to be "effectively communicated" to an employee. This is highlighted by the fact that Culbertson cites to no Washington case law to support his flawed argument. In truth, for the communication to be "effective," the analysis is simply whether there has been "reasonable notice" to the employee that the employer is disclaiming intent to be bound by what otherwise appears to be promises of employment conditions. 25 Wash. Prac., Contract Law And Practice § 17:5 (2d ed.); Swanson, 118 Wn.2d at 531, 826 P.2d 664.

Culbertson contends that the disclaimers are not conspicuous because they are contained in a Handbook (on which he bases his claim) that is voluminous in length. However, effective communication of reasonable notice of the disclaimers is found when the disclaimer is in the very documents upon which the plaintiff's claims rely. See e.g. Nelson v. Southland Corp., 78 Wn.App. 25, 30, 894 P.2d 1385 (1995) (holding "the policies and procedures Mrs. Nelson relies upon each contained separate disclaimers ... [m]oreover, Mrs. Nelson admitted she received copies of

these procedures in a management seminar ... [i]n these circumstances, reasonable minds cannot differ ... [t]he trial court properly determined as a matter of law the disclaimers were communicated to Mrs. Nelson.")

Furthermore, Culbertson cites to Swanson v. Liquid Air Corp., 118 Wn.2d 512, 826 P.2d 664 (1992), for support that Wells Fargo's disclaimers were not effective and/or properly communicated to Culbertson; yet, Culbertson fails to discuss the facts of the disclaimers in Swanson in his Appellant's Brief, likely because he knows that they are drastically distinguishable from the undisputed facts of this case.

Unlike here, Swanson involved an issue between two inconsistent written employment materials. The first was an existing employee manual which stated that the employees' employment was at-will, and which contained a disclaimer. The second was a later drafted separate "Memorandum of Working Conditions" that was created by and between the employees and the employer after two days of extensive labor discussions. The "Memorandum" stated that after a 90 day probationary period, "at least one warning shall be given" prior to an employee's termination. Swanson, 118 Wn.2d at 516, 826 P.2d 664. Moreover, unlike the employee manual, the Memorandum did not contain any disclaimer language, or provide the employer any discretion in the policy.

Ultimately, the court in Swanson held that because the two written documents were inconsistent, and the Memorandum was drafted after the employment manual, genuine issues of material fact existed as to whether in the Memorandum the employer made "a promise of specific treatment in specific circumstances" when it wrote that it would not discharge plaintiff without at least one prior warning for certain instances of misconduct. Id. at 525-526.

Here, unlike Swanson, there is only one written document upon which the parties are relying: the Handbook, which does not contain contradictory/inconsistent language with respect to terminating Culbertson's employment. Moreover, nowhere in the Handbook does it ever state that Wells Fargo shall or must do anything specific (including but not limited to "problem solving" and/or "dispute resolution") prior to terminating Culbertson's at-will employment. In fact, directly distinguishable from Swanson is the fact that the statements/language that Culbertson relies upon to support his claim also contains the discretionary statement and reinforces the at-will employment relationship. It states that "the policy is not progressive" and that Wells Fargo "reserves the right to use any part of the process ... and, if necessary, to terminate employment without implementing performance counseling and corrective action." (CP 879) Finally, the most significant distinguishable fact of Swanson

from this case is that there is a disclaimer contained in the same document that the Culbertson attempts to rely upon – the Handbook.

There is a Washington case which does apply here however; the undisputed facts and allegations of Culbertson's wrongful discharge claim are directly analogous to a recently reported Washington appellate case which dismissed a claim of specific promises in specific situations - Quedado v. Boeing Co., 168 Wn.App. 363, 276 P.3d 365 (2012).

Similar to this case, Quedado involved an at-will employee who was investigated, and then suffered an adverse employment action as a result of the employer's investigation. In affirming the summary judgment dismissal, the Court held that "without evidence of a promise that modified Quedado's at-will employment status, his theories of breach of implied contract and equitable reliance on a promise of specific treatment must fail." Quedado, 168 Wn.App. at 375, 276 P.3d 365. Reaching its conclusion to affirm the summary dismissal, the Court found that the employer, Boeing, had effectively communicated a sufficient disclaimer to prevent any such claim of specific promises in specific situations:

> At a minimum, the disclaimer must state in a conspicuous manner that nothing contained in the handbook, manual, or similar document is intended to be part of the employment relationship and that such statements are instead simply general statements of company policy. [cites omitted]. Boeing's disclaimers met the minimum requirement described in Swanson.

Quedado, 168 Wn.App. at 374, 276 P.3d 365.

In addition, the Quedado Court noted that the Boeing disclaimers (which were not bolded, underlined and/or italicized) were effectively communicated (conspicuous) to the employee because they were on/in the first page of both documents the employee was relying upon:

> Quedado declares that he never signed a disclaimer in any Boeing employment policy and contends the disclaimer was therefore ineffective. But he does not claim he was unaware of the disclaimers. Indeed, he claims to have known enough about the specific contents of the two documents to rely on them. It is not plausible that he was aware of what the documents said about how to conduct an investigation and take corrective action, yet remained unaware of the conspicuous disclaimer.

Quedado, 168 Wn.App. 363, 374, 276 P.3d 365 (2012).

These are the same undisputed facts regarding the disclaimers that are present in this case. In the plain language of the Handbook, Wells Fargo, like Boeing, provided multiple clear disclaimers that it's Team Member Handbook and the policies therein did not create a contract and did not in any way alter or amend the at-will employment relationship. Furthermore, there are no facts that support that Wells Fargo's disclaimer was negated by later, inconsistent representations.

2. Wells Fargo's Team Member Handbook contains only general statements of company policy that does not amount to promises of specific treatment in specific circumstances.

The second circumstance when employers will not be bound by statements in employee handbooks is when policy statements therein are merely general statements of company policy, are not promises of specific treatment, and are not binding on an employer. Thompson, 102 Wn.2d at 231, 685 P.2d 1081; see e.g., see also, McClintick, 105 Wn.App. at 922, 21 P.3d 328 (affirming a dismissal of such a claim and holding that the "guidebook does not amount to a promise of specific treatment in specific situations [as] it contains no terms such as 'shall,' 'will,' or 'must' that indicate the practice is mandatory. Even if it were applicable to TPM's employees, the guidebook was merely advisory.").

The statements from the Handbook that Culbertson alleges create specific promises are "serious commitments," "guiding principles," "fairness," "two way communications," "free flow of questions, answers, and ideas," "open, honest and direct communications," "respect," "consistency," and "professionalism" in problem solving between "team members" and Wells Fargo. (CP 12) Culbertson further asserts that statements of "fair treatment" in conjunction with provisions of the Handbook chapter entitled "Career, Performance, & Problem Solving," that discuss guidelines for "problem solving," "dispute resolution," and "termination decision review," create questions of fact as to whether the

Handbook has specific promises in specific situations necessary to support his wrongful discharge claim.

Culbertson's citation to these Handbook terms is not enough to survive summary judgment, as all of these words picked out of the Handbook by Culbertson are exactly the type of words that Washington courts find to be general policy statements that are not binding on an employer, are not mandatory policies, and do not create a claim.

The statements in the Wells Fargo Handbook are akin to those statements in Boeing's documents in Quedado, where the Court found insufficient as a matter of law. In Quedado the Court examined the actual language of the employment documents and found that the statements of "fair" treatment were only general policies:

> The statement that Boeing will conduct its business fairly, impartially, and in full compliance with all laws and regulations can be read only as a general promise that fits squarely within what the Thompson court called "merely ... general statements of company policy, and thus, not binding." Thompson, 102 Wash.2d at 231, 685 P.2d 1081. In Thompson, the Supreme Court examined a similar statement in an employee manual, stating that "terminations will be handled in a fair, just and equitable manner." Thompson, 102 Wash.2d at 224, 685 P.2d 1081. The court held that this language "merely implements a company policy to treat employees in a fair and consistent manner," and did not constitute a specific, binding promise. Thompson, 102 Wash.2d at 224, 685 P.2d 1081; see also Hill v. J.C. Penney, Inc., 70 Wash.App. 225, 235, 852 P.2d 1111 (rejecting theory that employer's "general policy of fair treatment" modified the employment at-will

> relationship because "general policies and subjective beliefs do not modify an at-will employment contract"), review denied, 122 Wash.2d 1023, 866 P.2d 39 (1993). Boeing's code was likely intended to foster a general "atmosphere of fair treatment" for Boeing employees. Thompson, 102 Wash.2d at 229, 685 P.2d 1081. But such an "atmosphere" is not enough to modify the at-will relationship. Bulman, 144 Wash.2d at 343, 27 P.3d 1172. The Boeing Code of Conduct does not provide a basis for this lawsuit.

Quedado, 168 Wn.App. at 370-71, 276 P.3d 365. Thereby, in accordance with existing Washington law, the general statements of company policy found and cited by Culbertson in the Wells Fargo Handbook do not support a claim as a matter of law.

3. Wells Fargo's Team Member Handbook expressly reserves to Wells Fargo complete discretion for it to terminate Culbertson's at-will employment.

The third circumstance in which the equitable claim for specific treatment in specific circumstances fails is when the employer specifically reserves the right to modify its policies or writes them in a manner that retains discretion to the employer; in these instances the employment handbooks do not create specific treatment in specific situations. Thompson, 102 Wn.2d at 231, 685 P.2d 1081; see e.g., Drobny v. Boeing Co., 80 Wn.App. 97, 103, 907 P.2d 299 (1995) (which affirmed a summary judgment dismissal of the claim because the employment manual gave the employer discretion in applying the discipline

procedures, and therefore as a matter of law the manual did not provide a promise of specific treatment in a specific circumstance.); see also, Clark v. Sears Roebuck & Co., 110 Wn.App. 825, 831-832, 41 P.3d 1230 (2002) (holding that "Sears retained discretion to depart from the standard procedure [so] the trial court correctly concluded as a matter of law that no promise was made of specific treatment in specific situations, [and] without a promise that modified Clark's employment at will status, none of her [wrongful termination] theories can succeed.")

As the record reflects, the patent language of the Handbook contains clear statements that Wells Fargo retained discretion in terminating employees. The Handbook blatantly makes it obviously throughout that Wells Fargo does not have a mandatory progressive discipline policy, and that Wells Fargo "reserves the right to use any part of the process that [it] feels is appropriate for the situation – and, if necessary, to terminate employment without implementing performance counseling and corrective action," [which] is consistent with [its] 'employment at will' policy." (CP 879)

Once more, Wells Fargo's express reservation of discretion in the Handbook is exactly the same as faced by the Quedado Court; it found:

> These statements were held not to be specific promises. "Boeing retained discretion to determine on a case-by-case basis whether conduct would be deemed serious enough to

> merit dismissal without recourse to progressive discipline." Drobny, 80 Wash.App. at 104, 907 P.2d 299. The same is true here.

Quedado, 168 Wn.App. at 372, 276 P.3d 365.

Again, the Wells Fargo Handbook makes it expressly clear that Wells Fargo, like Boeing, "reserves" to itself the ultimate discretion to terminate employment at-will, and to use, or not use, any of its stated Handbook terms. Therefore, because there is "no evidence that [Wells Fargo] intended 'to surrender its power'" to terminate Culbertson's employment with or without cause, and with or without advance notice, summary judgment is necessary based on this undisputed material fact alone. See Clark v. Sears Roebuck & Co., 110 Wn.App. 825, 831, 41 P.3d 1230 (2002). As a result, Culbertson failed to create an issue of fact on any of the three basis to conclude Wells Fargo altered Culbertson's at-will employment, precluding his wrongful discharge claim as a matter of law.

B. The Sales Incentive Plan in effect on Culbertson's termination precluded post-termination commissions as a matter of law, and no basis exists to reverse the trial court's refusal to apply "judicial estoppel".

Recognizing that the relevant 2013 Sales Incentive Plan applicable at the time Culbertson was terminated precluded post-termination commissions, Culbertson is forced to argue that Wells Fargo is "judicially estopped" from enforcing the 2013 Plan because it somehow made an

inconsistent argument in related, but separate, litigation. However, Culbertson improperly intermingles the facts, law and arguments relevant to two separate agreements, and no basis exists to "estop" Wells Fargo from enforcing the terms of the 2013 Plan, of which Culbertson properly received notice. As a result, the facts and law preclude Culbertson's recovery of such compensation under the "procuring cause" doctrine, and the trial court properly dismissed all of his claims based on entitlement to further compensation after termination as a matter of law.

1. The trial court properly exercised its discretion to refuse to apply judicial estoppel.

When reviewing a summary judgment where the moving party invoked judicial estoppel, the proper standard of review is abuse of discretion. Taylor v. Bell, ___ Wn.App. ____ 340 P.3d 951, 958 (2014). No such abuse occurred here.

In the action on appeal to this Court, Judge Price ruled as a matter of law that the 2013 Wells Fargo Sales Incentive Plan specified that post-termination commissions were not recoverable. (CP 224) It is undisputed that Culbertson was given notice of this Plan, which thus properly unilaterally modified his employment terms. Culbertson does not dispute that an at-will employee's employment compensation terms can be

unilaterally modified.[8] See, Duncan v. Alaska USA Federal Credit Union, Inc., 148 Wn.App. 52, 199 P.3d 991 (2008). Such modification requires only "reasonable notice." Govier v. North Sound Bank, 91 Wn.App. 493, 957 P.2d 811 (1998).

Instead of challenging this notion, which is well settled under Washington law, Culbertson instead asserts that Wells Fargo's position taken in relation to the litigation which it undertook to enforce a trade secrets agreement is contrary to its position in this litigation, and thus Wells Fargo is "estopped" from claiming that the 2013 Incentive Plan is enforceable, because it was not "bilaterally" agreed to between the parties. This is not accurate.

First, at no time in the separate litigation before Judge Plese did Wells Fargo assert that every unilateral change to Culbertson's employment terms had to be mutually negotiated and that he had to "accept" them via a signed document. The facts instead establish that Wells Fargo filed a separate lawsuit in Spokane County Superior Court to enforce the 2010 TSA. Unlike other unilateral modifications available to an employer, under Washington law, a non-compete/non-solicitation agreement can **only** be enforced against a current employee if the employee recieves "independent" consideration, in addition to continued

[8] Except for non-compete agreements. See, Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 100 P.3d 791 (2004).

employment. See, Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 834, 100 P.3d 791 (2004). In the action before Judge Plese, Wells Fargo moved for, and obtained a ruling that as a matter of law, the 2010 TSA Culbertson signed on January 5, 2010 was supported by independent consideration. That consideration was the increased percentages of commissions for the year 2010; the additional consideration was simply noted in Appendix A to the 2010 Sales Incentive Plan.

Wells Fargo never contended that the 2010 Sales Incentive Plan was limited to Appendix A which Culbertson signed on December 22, 2009, nor was his signature on that document relevant to the ultimate determination of the validity of the 2010 TSA. Nor, as Culbertson claims, has Wells Fargo ever contended that the 2010 Sales Incentive Plan was an "exchange of promises" or a "bilateral contract," not subject to revision. Instead, the sole issue before Judge Plese was whether Culbertson, by signing the **2010 TSA** (not Appendix A) on January 5, 2010, and thereafter accepting the increased commission consideration, created a valid and enforceable non-compete clause. Judge Plese found that it did.

However, nothing about the 2010 TSA is at issue here, nor does the law relative to non-compete clauses apply here. And the law cited by Culbertson relative to unilateral and bilateral employment contracts, Flower v. T.R.A. Industries, Inc., 127 Wn.App. 13, 27-28, 111 P.3d 1172

(2005), was irrelevant to the sole issue before the trial court of whether Wells Fargo gave Culbertson reasonable notice of the unilateral modification to his compensation terms. In Flower, the plaintiff claimed he promised to accept an offer of employment, sell his home in another city and relocate, while his employer promised to terminate him only for cause. Because the parties made the mutually binding promises, the court found that the later modification of the employment agreement in which the plaintiff became simply an at-will employee did not rescind the employer's obligation to terminate only for cause, because there was not mutual assent to the two exchanged promises. Thus, plaintiff was not "at-will."

Here, there is no dispute that Culbertson was an at-will employee and there is no "exchange" of promises in which Wells Fargo agreed not to exercise its rights to roll out changes in the compensation plan. In fact, the evidence is that Wells Fargo regularly rolled out such changes. Wells Fargo is not judicially estopped from asserting its right to change Culbertson's compensation plan by giving him notice of the 2013 Sales and Incentive Plan. Culbertson's claims that he signed Appendix A in 2009, and then in 2011, does not preclude future modifications by Wells Fargo upon reasonable notice.

And contrary to Culbertson's assertions, Judge Plese's order is not "contradictory" to the summary judgment granted here; she was neither asked to, nor did she rule as a matter of law that the entirety of Culbertson's employment and compensation agreement in effect at the time of his termination was contained in Appendix A which he signed on December 22, 2009. Similarly, Judge Plese did not have before her the issue of the existence of a "bilateral contract" which precluded Wells Fargo from altering any other terms of employment or compensation. Washington law is clear that for a **non-compete/non-solicitation agreement** the employer must offer "independent" consideration. Labriola, supra. Unlike all other terms of employment for at-will employees, the employer may not simply institute a new non-compete clause for an existing employee without offering something other than continued employment. Id. Culbertson signed the 2010 TSA based on the consideration of an additional 1% commission on new business revenue plus 1% commission on net new revenue. That independent consideration was noted in Appendix A to the Producer Plan and in the 2010 TSA. Culbertson thereafter signed the 2010 TSA, and received his increased commission rate. In response to the pleadings and motions on that narrow issue, Judge Plese ruled that independent consideration existed to render the 2010 TSA enforceable as a matter of law.

Judge Plese did not rule that Appendix A was Culbertson's entire employment and compensation agreement, nor that it was a bilateral contract; she did not find as a matter of law that "the exchange of promises" in Appendix A created a bilateral contract containing all the terms of Culbertson's' employment which could not be modified absent additional consideration or mutual consent by the parties.

Culbertson concedes that judicial estoppel exists only when a party takes "clearly inconsistent" positions. As outlined above, Wells Fargo's positions have not been clearly inconsistent because the issues are not identical. Culbertson attempts to take snippets of argument and assert that Wells Fargo and its Counsel were arguing that the independent consideration for the 2010 TSA constituted the entire agreement regarding compensation; it simply cannot be so interpreted. Counsel's comments have to be considered in context, and in reality separately dealt with the independent consideration necessary to the 2010 TSA contained in Appendix A, versus the entirety of 2013 Sales Incentive Plan in effect at Culbertson's termination. Counsel's discussion of "the Agreement" before Judge Plese related to the 2010 TSA, and the agreement to accept the additional consideration contained in Appendix "A." "The agreement" did not relate to the 2013 Sales Incentive Plan, and the entirety of the arguments and briefing before each court made this clear.

As a result, there existed no inconsistent positions to require any application of judicial estoppel. In fact, some courts require that judicial estoppel is limited to "sworn statements" made in various proceedings. Seattle-First Nat. Bank v. Marshall, 31 Wn.App. 339, 641 P.2d 1194 (1982). And the rule also applies only to inconsistent assertions of fact; it is not applicable to positions taken on points of law. King v. Clodfelter, 10 Wn.App. 514, 518 P.2d 206 (1974). Irrespective of that however, it is inapplicable when the party can explain the differences in the two positions. Garrett v. Morgan, 127 Wn.App. 375, 112 P.3d 531 (2005) overruled on other grounds, 160 Wn.2d 535 (2007). And the positions must ultimately be inconsistent, and it must appear unjust to permit the "change." Markley v. Markley, 31 Wn.2d 605, 198 P.2d 486 (1948); Seattle-First Natl. Bank, supra. (positions must be "diametrically opposed," and an abuse of judicial process). None of these factors establish a basis to apply judicial estoppel here. Instead, Wells Fargo and its Counsel argued different law applying to different facts, and apprised both courts of the relevant issues in the separate actions.

As a result, no court was "misled" and there is no "unfair advantage," as necessary to the policy behind judicial estoppel. See, Miller v. Campbell, 164 Wn.2d 529, 192 P.3d 352 (2008) (court focuses on three core factors in applying judicial estopped: whether there is an

inconsistency; whether there will be a perception a court has been misled; and whether one party will obtain an unfair advantage). The facts relevant to the 2013 Sale Incentive Plan and relevant to the 2010 TSA were fully laid out to both courts and counsel, and the issues thoroughly briefed and addressed. The trial court's decision was not so far outside the bounds of his discretion as to be an abuse, and his refusal to apply "judicial estoppel" was not in error.

2. The applicable compensation plan precludes Culbertson's claim to post-termination commissions under the procuring cause doctrine.

Culbertson asserts that he is entitled to summary judgment on his breach of contract action **only** because he claims the terms of his employment with Wells Fargo are silent regarding how post-termination commissions will be paid, thereby requiring use of the "procuring cause rule," which is a "gap filler" when an employment agreement is silent. See also, Willis v. Champlain Cable Corp., 109 Wn.2d 747, 748 P.2d 621 (1998). Thus, the parties agree that if there exists a term of Culbertson's employment that established how commissions would be awarded when an employee or agent is terminated, the "procuring clause" rule is inapplicable. Id. at 755.

Culbertson admits he is an at-will employee, but asserts that the only written terms of his employment of which he was aware were

contained in a document entitled "WFIS Sales Incentive Plan, Appendix A, Participate Draw and Commission Rates," which he erroneously calls the 2011 Incentive Plan. Culbertson's allegations regarding the terms and validity of prior plans or prior employment terms, while incorrectly characterized by Culbertson, are irrelevant to the Plan which applied at the time of Culbertson's termination.

Culbertson wholly ignores the written terms and conditions of his compensation contained in the 2013 Sales Incentive Plan, which govern his employment as a matter of law, apparently relying on the claim that Wells Fargo will be estopped to assert application of that Plan. However, Wells Fargo is not so estopped, and implicit in the right to terminate an at-will employee, is the right to modify the terms of the contract unilaterally. See, Duncan, 148 Wn.App. at 73 ("it is beyond dispute that Washington law provides that a terminable at-will contract may be unilaterally modified").[9] An employer can redefine the terms of compensation as well as other employment terms with reasonable notice, and an employee must then either accept those changes, quit, or be discharged. Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 229, 685 P.2d 1081 (1984).

[9] Culbertson was given the necessary "reasonable notice" of the unilateral modification to his compensation terms through the 2013 Sales Incentive Plan, as outlined in Section III.C. of this Brief, pp. 51-54.

As a result, Culbertson's reliance on the "gap filling" equitable remedy of the "procuring cause doctrine" has no application here, and the express terms of his employment preclude any recovery of post-termination commissions as a matter of law.

C. Culbertson cannot demonstrate a manifest abuse of discretion in the trial court's denial of his Motion to Continue Hearing under CR 56(f) because the new evidence sought by Culbertson would not raise a genuine issue of fact relevant to Wells Fargo's Motion for Partial Summary Judgment.

Whether a motion for such a continuance should be granted or denied is a matter of discretion with the trial court, and is reviewable on appeal for manifest abuse of discretion. Buhr v. Stewart Title of Spokane, LLC, 176 Wn. App. 28, 35-36, 308 P.3d 712, 715-16 (2013). A court only abuses its discretion when its decision is based upon a ground, or to an extent, clearly untenable or manifestly unreasonable. Id.; see also, Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., 176 Wn.App. 168, 313 P.3d 408 (2013), rev.den., 179 Wn. 2d 1019 (2014) (holding that a trial court did not abuse its discretion by denying a motion for continuance to obtain affidavits in opposition to a motion for summary judgment because the information sought was not reasonably calculated to lead to the discovery of admissible evidence, and there was no need to continue the summary judgment hearing to obtain such information.)

There is no reasonable argument here that Judge Price's decision to deny Culbertson's CR 56(f) motion was manifestly unreasonable or clearly untenable, because the new information sought by Culbertson would not raise a genuine issue of material fact necessary for the Motion for Partial Summary Judgment. Culbertson claimed that he was in need of expert forensic inspection of the hard drive of his former Wells Fargo work computer to determine if an electronic link to the Wells Fargo's 2013 Incentive Plan had been opened. This was the link sent in an email to Culbertson by his supervisor, Tyndell, on October 29, 2013, alerting him to the existence of the website where the Plan document could be found. (CP 431, 1029, 1033) Nonetheless, Culbertson does not dispute that he did actually receive the October 29, 2013, work e-mail from Mr. Tyndell.

The trial court, in its discretion, may deny a motion for continuance when (1) the requesting party does not have a good reason for the delay in obtaining the evidence; (2) the requesting party does not indicate what evidence would be established by further discovery; or (3) the new evidence would not raise a genuine issue of fact. Butler v. Joy, 116 Wn.App. 291, 299, 65 P.3d 671 (2003). A motion for a continuance is properly denied when a party seeking a continuance in a summary judgment hearing based on an assertion of discovery to be had, fails to establish how the desired evidence would raise an issue of material fact.

Briggs v. Nova Services, 135 Wn.App. 955, 147 P.3d 616 (2006). An assertion that the discovery request is within the scope of discovery is insufficient to form the basis for a continuance of summary judgment. Thong Choom v. Graco Children's Products, Inc., 117 Wn.App. 299, 71 P.3d 214 (2003). Here, Culbertson had failed to establish for Judge Price any of the bases to entitle him to a continuance under CR 56(f).

Again, the relevant Washington law as outlined herein regarding an employer's unilateral modification of an employee's compensation terms does not require that Wells Fargo establish that Culbertson actually reviewed the 2013 Sales Incentive Plan in any detail or that he actually read it. It only requires that Wells Fargo gave him "reasonable notice" of it. See, Duncan, 148 Wn.App. at 70. The evidence established that Culbertson was apprised of the coming 2013 Incentive Plan, that the changes from the previous Plan were outlined, that he was given a website where the Plan existed, and engaged in discussions regarding various sections of the 2013 Plan. The evidence that Culbertson asserts was necessary to respond to the summary judgment is whether or not he actually clicked on the website to take him to the underlying 2013 Sales Incentive Plan document to read it. However, that is not germane, nor does it create a genuine issue of fact one way or another on whether he was **given** "reasonable notice" that the document existed.

Ultimately, if Culbertson chose not to go to the website, not to review the document in detail, not to request an additional hard copy of it, not to ask any other questions about it, all is wholly irrelevant to the sole issue on summary judgment, which is whether Wells Fargo properly gave him "reasonable notice" of the Plan in effect at the time of his termination. A party cannot create an issue of fact to defeat summary judgment by simply ignoring notice given, or refusing to review documents of which he had reasonable notice. As a result, whether or not he went to the website and actually reviewed the document does not create an issue of material fact to defeat summary judgment, and the trial court did not abuse its discretion by denying Culbertson's CR 56(f) Motion.

D. Culbertson should not be entitled to an award of attorney's fees or costs on Appeal.

Finally, Culbertson has included in his Appellant's Opening Brief a request for an award of attorney fees and costs on appeal under RAP 18.1, pointing to RCW 49.48.030 as a statutory basis for fee and cost recovery. RCW 49.48.030 plainly states if an employee recovers a "judgment" for wages owing then attorney fees shall be assessed against the employer. Interpreting the statute as written, Culbertson is not entitled to recovery fees and costs because he has not, and should not "recover a judgment for wages owing" against Wells Fargo. Culbertson's appeal lacks merit as

outlined above, and the Appellate Court should affirm the summary judgment order of dismissal of Culbertson's claims, and therefore Culbertson's request for fees and costs should also be denied.

IV. CONCLUSION

For the foregoing reasons, Respondents request that the Court affirm the summary judgment dismissal of Culbertson's claims one through ten of his Complaint, and affirm the denial of Culbertson's Motion to Continue Hearing.

DATED this 11th day of March, 2015.

SCOTT A. GINGRAS, WSBA No. 43886
WINSTON & CASHATT, LAWYERS,
a Professional Service Corporation
Attorneys for Respondents

DECLARATION OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 11th day of March, 2015, at Spokane, Washington, I caused a true and correct copy of the foregoing document to be served on the following counsel in the manners indicated:

Patrick J. Kirby	**VIA REGULAR MAIL** ☐
Patrick J. Kirby Law Office PLLC	**VIA CERTIFIED MAIL** ☐
The Paulsen Center, Suite 802	**HAND DELIVERED** ☒
421 West Riverside	**BY FACSIMILE** ☐
Spokane, WA 99201	**VIA FEDERAL EXPRESS** ☐

Attorney for Appellant

DATED at Spokane, Washington, on March 11, 2015.

Vickie R. Fulton

Vickie Fulton